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No. 681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

TEXACO INC., ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Texaco Inc., *et al.* (Texaco *et al.*), conditionally cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 19, 1970, in the event petitions for a writ of certiorari filed by other parties below are granted by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals (Continental Appendix A, pp. 1-70)[1] and its opinion on petitions for

[1] Simultaneously herewith, petitioners Continental Oil Company, *et al.*, are filing in No. 1486 Appendices to their Petition for Writ of Certiorari containing the opinions and judgment below, the agency opinions, and statutes involved. References herein to "Con-

rehearing (Continental Appendix B, pp. 1-3) are not yet reported. The opinions and orders of the Federal Power Commission (Continental Appendices D, pp. 1-256, and E, pp. 1-112) are reported at 40 FPC 530 and 41 FPC 301. The opinion of the Hearing Examiner (III J. A. (I) 62d-447d) is reported at 40 FPC 703.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1970 (Continental Appendix C, p. 1) and was clarified by an opinion and order denying petitions for rehearing entered on June 16, 1970 (Continental Appendix B, pp. 1-3). We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

In light of the opinions and judgment below, Texaco *et al.*, deem petitions for writs of certiorari in this case premature and questions raised thereby not yet ripe for review by this Court. However, if this Court concludes otherwise and grants petitions filed by other parties, the following questions necessarily are also presented:

1. Whether the Court of Appeals erred in refusing to enter an order reversing and remanding the case to the Federal Power Commission after: (a) the Commission, in response to inquiry from the Court of Appeals, formally requested a remand; (b) the Court of Appeals

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tinental Appendix" are to that document. Petitioners Continental Oil Company, *et al.*, are also filing forty copies of the Joint Appendix in the Court of Appeals which consisted of four volumes designated as Part I and two volumes designated at Part II. A citation here to "III J. A. (I) 62d" therefore refers to Volume III of Part I, page 62d. Such page designations appear at the bottom of each page, and pages included in each of the volumes are shown in parentheses at bottom of the cover of each Volume of that Joint Appendix. See also Appendices hereto.

expressed its view that the opinions and orders on review were deficient and Commission reconsideration was warranted; (c) the Court of Appeals had found the Commission's opinions and orders inadequate and incomplete, particularly as to findings on critical issues of a national and area natural gas supply deficiency and of industry capital requirements for exploration and development; and (d) the record showed, and the Court of Appeals recognized, that the Commission had misinterpreted and failed to apply this Court's decision in the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

2. Whether the Commission unlawfully ordered rate reductions and refunds by failing to follow *Permian* and failing to make required findings upon: (a) demand for natural gas and the supply needed to meet that demand; (b) incentives necessary for the required exploratory effort; (c) adverse consequences of a rollback of rates to levels of the 1950's; and (d) effect of area rates allowed upon capital requirements and the exploratory effort needed to assure adequate supplies.

3. Whether the Commission erred in refusing to consider current evidence as to the decline in exploration and inadequacy of gas supply to meet foreseeable demand, and whether the Court of Appeals erred in affirming such refusal and denying a motion for leave to adduce such evidence before the Commission under Section 19(b) of the Natural Gas Act.

4. Whether in determining revenue requirements, the Commission erred in relying principally upon (a) "unit costs" based upon imprecise, unsupported, and erroneous allocation methods, and (b) stale, atypical, and unrepresentative data to determine revenue requirements, conflicting with principles stated in *Baltimore and Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87 (1968).

STATUTES INVOLVED

Sections 4(a), 4(e), 5(a), [illegible] of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717c, 717d, are involved and are reproduced in the Appendix F, pp. 1-3.

STATEMENT

This is an area rate case under Sections 4 and 5 of the Natural Gas Act. After hearings and [illegible] issued September 25, 1968, the Federal Power Commission, on October 1, 1969 [illegible] rates for sales of natural gas produced in the offshore Southern Louisiana area. The effective date was October 1, 1968 and also provided for the collection of refunds. This area of approximately 34,000 square miles is the source of approximately one-fifth of the natural gas supply and serves [illegible] 28 states in the eastern and central United States in which approximately 70% of the [illegible] sides. The effect of the Commission's [illegible] rollback to prices [illegible] a reduction of area revenues by more than $70 million per year. IV R. A. [illegible]

However, by the time of hearing [illegible] there was increasing [illegible] natural gas. The [illegible] many interstate pipelines in the [illegible] and today is a recognized [illegible] of the natural gas industry. [illegible] cluded that impingement of this [illegible] effect of the Commission's [illegible] exploratory effort and its [illegible] in 1969, 1970, and the future had not been properly considered by the Commission [illegible] new supply studies released by the Commission staff in late 1969 and other data that became available after

the record closed in 1965 and after the issuance of the Commission's opinion on September 25, 1968. The Court of Appeals also found the Commission remiss in not following the opinion rendered by this Court in *Permian* on May 1, 1968, particularly in failing to give heed to this Court's numerous warnings that the Commission must consider the effects of prescribed area rates upon supply requirements, and admonitions that the Commission must improve its area-rate methodology, fact-finding, and decisional processes. With express "misgivings," the Court of Appeals affirmed the Commission, but on the assumption the Commission would reconsider its opinions and orders in the light of deficiencies enumerated by the court and the Commission's expressions of concern over supply. The court thus indicated that if current data warranted, the Commission was free to stay, rescind, and set aside any parts of its opinions and orders. Petitions for rehearing were filed by these and other parties raising questions as to Commission powers in light of "affirmance," and in response to inquiry from the court, the Commission filed a formal request for remand. Thereafter, the Court of Appeals did not change its "affirmance," but clarified and restated its intent that the Commission could and should reassess its opinions and orders; the Commission then entered an order further staying its orders, and today has before it a motion by these and other parties seeking reopening, rescission, and modification of the opinions, responsive to the Court of Appeals. In view of this posture of the case, this petition by Texaco *et al.*, is a conditional petition only.

Procedural History. The case was instituted on May 10, 1961 to fix rates for all jurisdictional sales of natural gas by producers in the Southern Louisiana area (III J.A. (1) 1d).[2] These petitioners are producers who were

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[2] This order defined the area as the portion of the State of Louisiana lying south of the 31 parallel and including all areas, both state and federal, in the Gulf of Mexico off the shore of Louisiana.

respondents before the Commission,[3] and the hundreds of parties included other producers, pipelines, distributors, and state commissions. Hearings commenced on December 10, 1963, and concluded November 5, 1965. The Commission's opinion and implementing orders were issued September 25, 1968, and timely applications for rehearing and motions for stay were filed under Section 19(a) of the Natural Gas Act (see IV J. A. (I) 764d). In these applications and in motions for limited reopening of the record, Texaco *et al.*, sought admission of then more current evidence reflecting *inter alia*, consideration of the *Permian* decision, the deteriorating national gas supply situation, rising costs, and other data relevant to rate design. On October 23, 1968, the Commission granted rehearing to consider all applications together (IV J. A. (I) 771d), but on March 20, 1969, issued its Opinion No. 546-A denying the applications, motions for stay, and motions for limited reopening, and modifying its original opinion in part only (IV J. A. (I) 892d). Simultaneously, the Commission instituted a new proceeding at Docket No. AR69-1 to consider new area rates, but only for gas-well gas sold under contracts dated on or subsequent to October 1, 1968 from the Offshore Federal Domain only (see IV J. A. (I) 896d).

Timely petitions for review were filed pursuant to Section 19(b) of the Act. The first such petition was filed in the Court of Appeals for the Fifth Circuit, and the Commission certified the record to that Court on March 26, 1969. Motions for partial stay and motions for leave to adduce additional evidence, particularly as to the supply situation, also were filed by producer petitioners. After a conference before the court, the Commission issued an order staying until October 13, 1969, the provisions of its orders requiring rate reductions, and this

[3] As directed by the Commission, most of the present petitioners participated and presented evidence cooperatively and were part of a group styled below as "The Amerada, *et al.*, Group."

stay subsequently was continued by the court after argument on December 17, 1969.

The court's opinion was issued March 19, 1970; timely petitions for rehearing followed raising, *inter alia*, the questions as to relationship between "affirmance" and Commission powers to reconsider and rescind its orders; the court thereupon requested Commission views, and in response, the Commission requested remand;[4] however, on June 16, 1970, the court denied the petitions, but reiterated that its "affirmance" was not intended to bar Commission reopening of any part of its order and retrospective as well as prospective changes of the orders by the Commission. The Commission entered its order continuing the stay as to rate reductions and refunds on July 2, 1970, effective upon dissolution of the court's stay; and on July 14, 1970, the court issued its judgment.

The Commission Opinions. Without significant change of methods criticized in *Permian*, the Commission prescribed area rates, but added a novel indefinite moratorium and method for future regulation. As noted, the end result is a rollback to price levels of the 1950's and insufficient revenues for current required exploration and development.

On the major issue of adequacy of supply, the Commission recognized a correlation between supply and price and responsiveness of needed exploration to price (Continental Appendix D, pp. 67, 154-159). However, the Commission made no findings as to future demand or future gas supplies required to meet demand, particularly supply requirements from Southern Louisiana. Producers asserted these omissions as errors and cited mounting evidence of an impending gas shortage in seeking rehearing and limited reopening, urging the Commission to consider current data on supply, demand, and

[4] Chairman Nassikas and Commissioner O'Connor did not join in the request for remand.

resultant capital requirements, and to make necessary findings (Continental Appendix E, pp. 3-5). However, reopening was denied, leaving in effect the rates prescribed primarily on the basis of 1960 cost data and without consideration of current data on supply.

In prescribing such rates, the Commission used costing methods requiring compositing of costs and expenses, determining an investment rate base, applying a rate of return to that base to arrive at the return allowance, adding these amounts, and ultimately dividing by volumes to arrive at average "unit costs." Using composited cost data, the Commission separately determined the cost per Mcf of "flowing gas" (Continental Appendix D, pp. 85-107), and of "new-gas-well gas" (Continental Appendix D, pp. 29-84). The "flowing gas" cost was determined on the basis of composite historical averages for the 1960 test year, with some data on a national basis and some data on an area basis. The "new gas-well gas" cost was derived from data from numerous publications and questionnaires reflecting primarily 1960 data. With these data, the Commission (1) constructed a rate base for capitalized investment, applied to this base a 12% rate of return, added certain expense items, and derived a "unit cost" of 18.36¢ per Mcf for flowing or "first vintage" gas (Continental Appendix D, 107); and (2) constructed a "current cost" model and derived a "unit cost" of 18.80¢ per Mcf for "second" and "third vintage" gas (Continental Appendix D, p. 84). These two cost determinations then were used as the basis for prescribing the following maximum rates for different "vintages" of gas produced in onshore Southern Louisiana (Continental Appendix D, p. 179).

a. *First Vintage* (Contracts dated prior to January 1, 1961)—18.5¢ per Mcf for all casinghead gas and gas-well gas and residue gas derived therefrom.[5]

[5] All rates are stated per Mcf at 15.025 psia unless otherwise indicated.

b. *Second Vintage* (Contracts dated between January 1, 1961 and October 1, 1968)—19.5¢ per Mcf for gas-well gas and residue gas derived therefrom, and 18.5¢ for all other types of gas;

c. *Third Vintage* (Contracts dated on or after October 1, 1968)—20¢ per Mcf for gas-well gas and residue gas derived therefrom, and 18.5¢ for all other types of gas.

For gas produced offshore Southern Louisiana, area rates were fixed at 1.5¢ per Mcf lower for each vintage and type of gas.

All rates are subject to adjustment downward if Btu content of gas is less than 1,000 per cubic foot or upward if Btu content exceeds 1,050 (Continental Appendix D, pp. 180-181). Third vintage rates also will be subject to downward adjustments for deviations from "pipeline quality" standards. (Continental Appendix D, pp. 179-180).

The Commission also issued a new regulation providing that area rates continue in effect until changed by Commission action, imposing an indefinite moratorium on rate increases for first and second vintage sales; a fixed moratorium on third vintage onshore sales until January 1, 1974; and an indefinite moratorium on offshore third vintage except for increases of 1.5¢ per Mcf collectable subject to refund only. The Commission also provided that producers could seek relief by filing petitions "to waive or lift the limitation on rate change filings" (Continental Appendix D, p. 169), or by petitioning for rulemaking to amend the rates on an area basis (Continental Appendix D, pp. 171-174). The orders accompanying the opinions also imposed requirements for filing rate schedule supplements reflecting rates prescribed, statements as to quality adjustments and resulting area rates, and reports of amounts subject to refund under Section 4(e) of the Act after application of

the prescribed rates in consolidated rate suspension dockets. Actual payment of refunds of past collections remained subject to further order of the Commission, but in absence of stays, rate reductions would have been effective prospectively from October 1, 1968.

In a separate opinion on rehearing, Commissioner John A. Carver, Jr. dissented (Continental Appendix E, pp. 72-112), emphasizing the central issue is whether prices fixed are sufficient to elicit adequate gas supplies, and ". . . a serious problem of gas supply has been identified, requiring action *in this case*" (Continental Appendix, E, p. 74). He noted that trends reflecting increasing demands and inadequate additions to reserves foretell deliverability problems which could lead to higher consumer costs; viewed "incentive" as negated by the rollback in rates, particularly because revenues from first and second vintage gas are the major source of capital funds for new investment; stated that substantial refunds and rate reductions amounted to retroactive expropriation of the "incentive" which had induced the initial commitment to interstate commerce; and concluded that the record supported fixing area rates at higher levels (Continental Appendix E, pp. 110-112).

The Court of Appeals Opinions. The same central issue was recognized by the Court of Appeals, and the major theme of its opinions is that on the supply problem and related issues, the Commission had failed to follow this Court's admonitions in *Permian*. The court thus began with the statement that its "affirmance does not reflect full satisfaction with the performance that the Commission turned in . . ." (Continental Appendix A, pp. 2-3), and ultimately concluded that in light of "new evidence of a possible impending gas supply shortage" (Continental Appendix B, p. 1), the court intended to permit the Commission "to stay, modify or rescind any part of its order, notwithstanding our affirmance, if circumstances appearing since the issuance of the or-

ders make a change advisable" (Continental Appendix B, p. 2). Between these statements, the court found more than ample grounds to reverse the Commission on each of the questions now presented by Texaco, *et al.* and to fashion a remand for corrective action by the Commission in accordance with such an opinion.

The court first traced evolution of producer rate regulation culminating in the *Permian* decision, which was issued more than four months prior to the Commission opinion in the instant case. The court then summarized the Commission opinion, but noted that two days prior to oral argument before the court, the Commission had issued an order enlarging the scope of the new Docket No. AR69-1 proceeding to include the question of *prospective* adjustment of onshore and offshore Southern Louisiana area rates of all vintages (Continental Appendix A, pp. 16-17). These and other indicia were taken to mean "that the Commission now recognizes the possibility of a serious supply deficiency and that it did not recognize this possibility in the decision we are reviewing" (Continental Appendix A, p. 17, footnote omitted). In the court's view, however, this militated in favor of "affirmance rather than reversal," but subject to the court's expressions as to Commission powers and functions to modify its orders, discussed *infra*.

The court next considered substantive issues raised by these and other parties. It first rejected arguments that the cost determinations, rate of return allowance, and "noncost elements" were unsupported or "overly generous to producers" (Continental Appendix A, pp. 18-30), and then turned to issues raised by these and other producer petitioners. On issues raised by the indefinite moratorium, the court found *Permian* not dispositive (Continental Appendix A, pp. 31-32), but also found that the new regulation and an indefinite moratorium did not violate Constitutional requirements or the Administrative Procedure Act, and that Section 4 of the Natural

Gas Act did not preclude an indefinite moratorium (Continental Appendix A, pp. 32-36). On questions involving the Commission's rate of return, cost, and rate design determinations, the Court of Appeals was similarly "troubled" and critical. Thus, on the question of improper application of the "comparable earnings test" to determine rate of return, the court concluded producers "present persuasive evidence" that the test period used by the Commission was "unrepresentative" (Continental Appendix A, pp. 39-40). On other questions as to costs used, the court found *Permian* controlling and that Commission conclusions on issues as to use of stale, unrepresentative data were supported by statements "that costs as a whole" had been "remarkably steady (or were even declining slightly)" during the decade between 1960 and 1970; but, at the same time, the court stated its agreement with Commissioner Carver's dissenting view "that the Commission should not have relied upon cost calculations floating in a vacuum but should have reviewed its computations in light of supply, demand, and other market forces . . ." (Continental Appendix A, pp. 45-46).

The "most serious issue" involving Commission findings and legal standards—termed "the supply problem" by the court—similarly gave rise to extensive, telling revelation of error (Continental Appendix A, pp. 46-56). The Court of Appeals recognized that this Court held in *Permian* that "adequate findings" would be required in the future, but noted that the Commission had left gaps similar to the omissions criticized by this Court in *Permian*. Thus, the Court of Appeals found ". . . the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Continental Appendix A, pp. 49-50), and listed defect after defect in "findings" on related questions of supply, demand, and actual availability of capital to the industry at rates prescribed (Continental Appendix A, pp. 52-69). The court also noted existence of more current data available to the Commission, including the study by the Commis-

sion's Staff released in October, 1969, which indicates "perhaps a certainty, that the supply of gas is dangerously low" and "a serious shortage, in fact, may already be unavoidable" (Continental Appendix A, p. 52). In sum, the court found that the assessment of the crucial facts as to supply, demand, and impact of prescribed rates called for by *Permian* had not been made in this case.

Nevertheless, the court did not grant motions before it for leave to adduce current evidence before the Commission in accordance with procedures of Section 19(b), and did not reverse and remand the case to the Commission. Instead, it expressed "serious misgivings about affirming the Commission" and did so only with affirmative statements that the Commission still may "set aside the present order pending further determination" (Continental Appendix A, pp. 56-57); that "affirmance" is not a "judgment that the supply problem is not serious enough to require immediate modification of the order herein sustained" (Continental Appendix A, p. 59); that on "the crucial issue of sources for adequate financing, the Commission's findings, and for that matter the evidence, are almost nonexistent" (Continental Appendix A, p. 63); that from the Commission's findings it is impossible to know current and future demand for Southern Louisiana gas, and supply must be considered in light of demand (Continental Appendix A, pp. 65-68); that "the Commission must explain the relationship between the level of service, the demand for service, and the price it sets" (Continental Appendix A, p. 68); that the "mandate" of the Court should not "be interpreted to interfere with Commission action that would change the rates" (Continental Appendix A, p. 69); that, citing Section 16 of the Act and with emphasis supplied, the Commission had power to "rescind" its orders; and that dissolution of the court's stay would be without prejudice to Commission power "to stay its own order or to take any order or to take any other appropri-

ate action affecting this case" (Continental Appendix A, p. 70).

Petitions for rehearing by these and some of the other parties urged, *inter alia*, that express reversal and remand were required in light of the deficiencies in the Commission orders so found by the court, and also raised the question of whether an "affirmance" could leave the Commission with powers to stay, vacate, modify, or rescind its orders, as contemplated by the court. The court thereupon directed the Commission to respond to the petitions and to two specific questions concerning (1) Commission authority to stay, modify or rescind an order that has been "affirmed"; and (2) equitable powers of the court to "affirm" while preserving Commission powers "to stay, modify, or rescind" an order.[6] In response, the Commission (1) took the position that it would not "have authority to permit any *retroactive* increases or decreases in a rate order, unless authorized to do so by a court"; (2) stated that extent of the court's "equitable powers" had not been decided, and the court had "full statutory power to authorize or instruct the Commission" to "reconsider" the record or "reopen the record" for specific purposes "without necessarily reversing the Commission and vacating the order for a new hearing"; (3) noted the need for clarification of the court's intent to authorize "retrospective adjustments" in light of its "use of the words 'sustained in full'"; and (4) requested

[6] The full text of the questions posed by the court is:

"(1) Whether the Federal Power Commission has authority to stay, modify or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.

"(2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify or rescind the order if the circumstances seem to make these actions advisable."

a "remand" so "that the Commission can discharge its regulatory responsibilities consistent with the Court's opinion."[7]

However, on June 16, 1970, the court entered an order denying the petitions for rehearing and an opinion stating that "affirmance of the Commission's orders is structured so as to allow the Commission great flexibility" (Continental Appendix B, p. 1). The court stated that under Section 19(b) of the Natural Gas Act, the court had "broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so" (Continental Appendix B, p. 2). The court, nevertheless, emphasized that its "judgment is affirmance and not a remand," and that all issues as to reopening, modification of rates, and disposition of refunds were to be considered before the Commission (Continental Appendix B, pp. 2-3).

REASONS FOR GRANTING THE WRIT

1. Importance of this case to all segments of the natural gas industry and all classes of consumers cannot be overstated. A shortage of natural gas already exists, as now recognized by the Commission and as feared by the Court of Appeals. That shortage is directly involved in this case because rates prescribed apply to an area that now provides up to one-third of the total national supply and serves more than one-half the consuming population

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[7] "Response of Federal Power Commission to Petitions for Rehearing and Request for Remand," pp. 2-5 (Chairman Nassikas and Commissioner O'Connor did not concur in the request for remand).

of the United States. These rates were fixed primarily on the basis of 1960 cost data, without regard for the impending supply shortage, a decade of rising costs, expansive effects of inflation in the late 1960's, and compelling urgency for an increased national and area exploratory effort to attempt to find supply to meet increasing demand. As an immediate result, under the rates so fixed, amounts now exceeding $375 million, including interest, would be "refunded" to pipeline companies, and producers' rates and revenues would be rolled back to levels of the 1950's. The ultimate result would be an immediate, further decrease of capital available for needed exploration and a crippling blow to any effective industry effort at present and for the foreseeable future to avoid a serious national natural gas supply deficiency.

This result is not endorsed by the Court of Appeals, is not sought by the Commission in light of facts now available to it, and is not now urged by most who were parties before the Commission and the Court of Appeals. The only valid question remaining is, in our view, how to remedy the situation so recognized by the court, Commission, and most of the parties, as promptly and as equitably as possible. To that end, the Court of Appeals fashioned a remedy with clear intent to leave the Commission free to take all corrective steps present circumstances and known facts dictate, including rescission of the deficient orders reviewed below. To the same end, relief sought before the Commission by Texaco *et al.* could moot issues raised by this petition and vitiate aggrievement of these petitioners under Section 19 (b) of the Act.

Several parties, however, still question the degree of urgency arising from the national shortage of natural gas, necessity for Commission rescission of the orders entered in this case, and validity of corrective steps by the Commission in light of the Court of Appeals' opinions. Such parties have indicated they would file peti-

tions presenting their questions to this Court. Should this Court grant any such petitions and conclude that the remedy fashioned by the court below is *not* available, then the "affirmance" below rested upon serious misinterpretation of the Natural Gas Act. The corrective measures contemplated by the court then would be foreclosed solely because of that misinterpretation and contrary to that court's intent; and the court would have erred in not entering a judgment of reversal and remand on the basis of its own opinions, of the request by the Commission for a remand, and of the objectives of corrective action stated by the agency and the court itself. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 353 U.S. 944 (1957).

If the court below so erred in its holdings as to Commission powers to take corrective action and to rescind its orders in light of the court's opinions, then that court also erred in entering and permitting conclusive finality for opinions and a judgment (1) conflicting with decisions of this Court as to required remand of cases under Section 19(b) once Commission error is apparent and corrective action is required; (2) conflicting with this Court's *Permian* opinion, particularly as to Commission responsibility for adequate supplies in applying the area rate method; (3) conflicting with *Permian* and other constructions of the Act on major questions of cost determinations, rate design, and of required findings as to impact of area rate orders; and (4) incorrectly deciding issues as to relationships between administrative agencies and reviewing courts of major importance under the Natural Gas Act and of general significance and applicability in administrative law and under other federal statutes having review provisions similar to Section 19(b) of the Natural Gas Act.

2. Reversal and a remand by the Court of Appeals were fully warranted and proper dispositions under this Court's constructions of Section 19(b) of the Natural

Gas Act. As reflected in *Federal Power Commission* v. *United Gas Pipe Line Co.*, 393 U.S. 71 (1968), the Court of Appeals' duty is to return cases by remand to the Commission "for further proceedings" when it concludes that the agency has erred by commission or omission, that reconsideration by the agency is appropriate, and that corrective action by the agency may be required.

Such established rules of agency-court relationships[8] are fully applicable under this statute. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 353 U.S. 944 (1957). A remand order, therefore, was the logical, lawful conclusion to the court's enumeration of a plethora of defects, inadequacies, gaps, and misinterpretations of *Permian*. The court thus stated what, heretofore, has been one of the predicates for judicial reversal, and, indeed, a requirement for remand of an agency order:

> ". . . A reviewing court contemplating the 'end result' test cannot in good conscience affirm the Commission unless it knows what the Commission is trying to do." (Continental Appendix A, p. 68).

This statement alone compelled remand particularly in light of the court's conclusions that from the "Commission's findings we cannot know" the future demand for Southern Louisiana gas, and without such findings the required levels of supply, of exploratory effort, and even of area rates cannot be known (Continental Appendix A, pp. 66-67). The court also had found Commission findings "almost non-existent" on the "crucial issue of sources for adequate financing" (Continental Appendix A, pp. 63-64), and these gaps alone should have precluded an "affirmance" that could, in any way, bar Commission correction of such errors.

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[8] See *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 (1943); 332 U.S. 194 (1947); *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17 (1952).

Beyond this, the formal request for remand by the respondent agency clearly should have been honored if this Court's prior constructions of Section 19(b), rather than an "experiment doctrine", remain controlling. See *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission, supra.* The Court of Appeals had stated, quite plainly, its own disapproval of the Commission's "performance," and that the court had "little inclination to join the Commission in presiding over" the possible "result" of a predicted "severe gas shortage" (Continental Appendix A, p. 47, fn.87). Responsive to this criticism, the Commission requested remand and obviously desired fully to exercise its corrective powers in light of facts now available and without questions as to legality of its corrective action. The court nevertheless adhered to the remedy it had fashioned, which, in its first opinion, the court considered required by what it termed "the 'experiment' doctrine of *Permian*" (Continental Appendix A, pp. 10, 60). Yet, Section 19(b) should not permit such a condemnation of the Commission to be coupled with denial of the agency's request for unquestioned power to correct the very errors on which the condemnation rests.

This case thus presents the question of whether *Permian*, or any other opinion of this Court, modified the relationship between administrative agencies and reviewing courts by creation of an "experiment doctrine" rendering reversal and remand inappropriate where the agency opinion is defective. Where error exists and corrective action is required, the settled principles heretofore controlling would dictate reversal and remand for further proceedings consistent with the reviewing court's opinion. Therefore, if there is today any legal impediment to corrective action by the Commission—including its power of rescission—following the opinions of the court below, that court erroneously rendered itself and the agency powerless to correct plain, recognized errors in this case. Under those circumstances, departure from settled principles and misinterpretation of *Permian* would have created such a result. All those adversely affected

by the substantive errors revealed below—including the consuming public—would be left entrapped by provisions of orders the court should not have approved, and which the agency expressly desired remanded to it.

If the remedy fashioned below is held inoperative by this Court, then the Court of Appeals' departure from this Court's earlier constructions of the review provisions of the Natural Gas Act should not be allowed to stand. If the nature of the court's judgment does preclude such corrective Commission action as rescission or retrospective modification of its orders, this Court's review is essential to insure reversal and remand called for by the agency, by the Court of Appeals' own preliminary conclusions, and by prior constructions of Section 19(b) by this Court. Orders of this Court also would be necessary to provide the agency the latitude it sought by requesting remand and to clarify the scope of statutory and equitable powers of a reviewing court under Section 19(b) of the Natural Gas Act and other statutes having the same or similar provisions for judicial review of agency orders,[9] particularly when a regulatory agency requests remand of its own opinions and orders.

3. Related to the question of required remand are questions raised by the Commission's failure to follow the warnings of this Court in *Permian*, by Commission misinterpretation of *Permian*, and by any perpetuation of misreadings of *Permian* in future administration of the area rate method.

This Court thus called for responsible consideration of the interrelation of rates, capital, supply and demand as affirmative, express parts of the Commission's fact-finding and decisional processes. Gaps as to these most vital facts affecting interests of consumers on the one

[9] See, *e.g.*, *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958); *International Union* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335 (1945); *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1951); *Civil Aeronautics Board* v. *Delta Air Lines*, 367 U.S. 316 (1961).

hand, and of investing producers on the other, were not contemplated by this Court. The Commission had more than four months to review this Court's *Permian* opinion before it entered its first opinion in this case, and more than ten months before it denied rehearing and motion to reopen. Yet, as found below, the Commission followed form without regard to substance. The Court of Appeals thus correctly was "disturbed" by the Commission's "excessive reliance" upon the mere "result" of *Permian* and correctly concluded that the Commission had not "read *Permian* carefully enough" (Continental Appendix A, p. 60). However, the court's reluctance to label the Commission's errors as clearly reversible rested on that court's error in assuming that an "experiment doctrine" was intended to immunize decisions in subsequent area cases of such national importance as this case, even in the face of a critical supply situation, patent disregard of *Permian* by the Commission, and failure to make the most basic findings required in an area rate case.

On the "most serious" issue of supply, this Court's mandate to the Commission in *Permian* also was plain, requiring Commission "assessment of the consequences of its orders for the character and future development of the industry."[10] In our view, this Court did not authorize an "experiment" even in a second major case where the adverse consequences are so apparent, as here, and the area is so vital to the total national supply. The court below thus erred in interpreting *Permian* as excusing all reversible errors. Consequences of repeated errors by the Commission include dissipation of capital funds that must be committed now to exploration if demand is to be met, and the continued inability of the industry to retain or even attract capital that cannot await round after round of "experiments" and possible proclamations of new area rates in another proceeding, four or five years hence. The record before the Court of Appeals, therefore, called for application of *Permian* as a precedent for ordering agency correction of reversible errors.

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[10] *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968).

However, this Court's instructions in *Permian* obviously must be repeated *if* the Commission rescission is precluded by the judgment below. At the same time, the misinterpretation of *Permian* in this case by the agency and the court, including unfounded inhibitions of the court below to reverse plain errors, should be set aside.

4. Questions involving determination of costs, use of atypical and unrepresentative data to determine revenue requirements, application of these determinations in rate design, and absence of required findings arise because of similar misreading of *Permian*, *Baltimore and Ohio R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87 (1968) and other decisions of this Court.

As noted below, ". . . a reviewing court must look to both individual components and overall effect of rates set by the Commission," and the agency has "broad discretion." (Continental Appendix A, p. 10). Yet, *Permian* also emphasized the necessity for properly supported findings of fact on critical issues in rate cases under Sections 4 and 5 of the Act. On the questions enumerated by these petitioners (*supra*, pp. 2-3), it therefore is clear that the court's failure to reverse the Commission also resulted in large part from the error of assuming applicability of an immunizing "experiment doctrine" (see Continental Appendix A, pp. 40-41).

For example, despite a general statement that the Commission adequately "explained" its cost findings, the court specifically noted important instances where critical cost and rate impact determinations are unsupported by findings. Such Commission failure to make findings on the components of its cost determinations and rates therefore remained grounds for reversal; and of particular significance was the failure of the Commission to consider consequences of its orders, and the court's recognition that the Commission's findings were deficient as to support for use of unexamined cost averages. The court indicates the Commission could eliminate these

questions with findings as to whether use of such averages will prevent large segments of the industry from recouping investment and will lead to greater concentration in the industry (Continental Appendix A, pp. 60-64), but the gaps are left unfilled in this case.

A related deficiency is the absence of Commission findings to support a conclusionary statement that capital from "outside sources" will be available for adequate financing, a statement the court notes is "a tenuous basis for our affirmance" (Continental Appendix A, pp. 63-64). The court thus apparently did not appreciate that the missing findings on "averages" and the availability of "outside" capital are both directly related to a deficient gas supply by the Commission's own reasoning. The record thus shows that 53 of 81 producers will be unable to recover their costs at rates fixed, and as to these producers, the Commission held that it will provide no relief by way of an increased price or by permitting abandonment.[11] Instead, the Commission held that such producers have the alternatives of achieving a fair return by *curtailing* their exploration and development program, or of assuming the risk that exploration and development will be profitable at the rates fixed in this case (Continental Appendix D, pp. 129-130). However, this very curtailment of exploration and development by a majority of producers necessarily will mean a lesser gas supply, and neither the Commission nor the court seemed to note that it is precisely this type of gap in the Commission's methodology, fact-finding, and rationale that *Permian* called upon the Commission to correct.

If, as the Court of Appeals assumed, the Commission now remains free to correct all of these errors in find-

[11] The Commission's categorical statement that it would not permit abandonment is to be compared with the Court's holding that the lawfulness of using cost averages would be "a different question" if persons regulated were prevented from going out of business when revenues fell below costs (Continental Appendix A, p. 42, fn.76). The Court thus further erred in determining the issue of lawfulness on an erroneous view of the Commission's own holdings.

ings and in determining costs, required return, and weight to be given these costs in rate design, the practical consequences and effect of erroneous precedent may disappear. If, however, these determinations in this case stand, each stands as a reversible error predicated on misreading of *Permian* and upon unlawful relaxation of requirements for express, clear, specific agency findings, resting on substantial evidence and for a lawful "end result" in a rate case.

5. The opinions of the Court of Appeals began and ended with expressions of concern over decline in supply and indicia of inability of the industry to meet even the present demand for natural gas. A statement of reasons this case may warrant review by this Court necessarily must begin and end with similar reference to what is now a "serious supply deficiency" of national concern (see Continental Appendix A, pp. 3, 68). The Court of Appeals did not err in calling upon the Commission to reconsider *all* parts of the opinions and orders on review in this case, and the Commission did not err in requesting an express remand and removal of any possible doubt as to its powers to take any required responsive action including rescission of the defective orders.[12] Such Commission action should be the most expeditious means of removing the legal errors, erroneous precedent, defective rates, and adverse supply consequences created by the opinions and orders reviewed below. However, if this Court should conclude that any question raised as to the judgment below warrants review and that the court below thereby left bars to corrective Commission action, then the questions presented by this petition will be reached and must be reviewed here. Otherwise, solely because of technical questions of wording, substantive remedies, responsive action, and efforts to ameliorate the supply deficiency could be cut off, despite the clear intent of the court below and the Commission's request for

[12] By their petitions for rehearing, these petitioners likewise sought formal reversal and an express remand order for similar reasons.

remand. Such a disposition of this case also would be detrimental to all segments of the natural gas industry and to the consuming public. Therefore, if this Court should grant other petitions raising issues as to Commission exercise of its corrective powers after the judgment below, the questions presented by this petition should be considered by the Court.

CONCLUSION

For the foregoing reasons, this conditional cross-petition for a writ of certiorari should be granted if this Court grants other petitions for writs as to the opinions and judgment of the Court of Appeals in this case.

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September 14, 1970

APPENDICES

Opinions of the Court of Appeals and of the Federal Power Commission are reproduced in the separate Appendices to the Petition for Writ of Certiorari filed by Continental Oil Company, *et al.* (see Appendices A, B, C, D, and E therein)

Statutes involved are also reproduced in the separate Appendices by Continental Oil Company, *et al.* (see Appendix F therein).

For convenience, the opinion of the Court of Appeals on petitions for rehearing and the judgment of the Court of Appeals are also reproduced *infra.*

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27492

SOUTHERN LOUISIANA AREA RATE CASES
AUSTRAL OIL CO., ET AL.,
Petitioners,

versus.

FEDERAL POWER COMMISSION,
Respondent.

Petitions for Review of Orders of the Federal Power Commission (Texas Case)

ON PETITION FOR REHEARING

(June 16, 1970)

Before THORNBERRY, COLEMAN and MORGAN,
Circuit Judges

PER CURIAM: In our original opinion, we indicated that there was new evidence of a possible impending gas supply shortage. Our affirmance of the Commission's orders is structured so as to allow the Commission great flexibility in dealing with this problem. To this end, we indicated that the Commission had authority under section 16 of the Natural Gas Act to stay, modify or rescind any part of its order, notwithstanding our affirmance, if circumstances appearing since the issuance of the orders make a change advisable. Petitioners on

rehearing, however, have argued to this Court that the Commission may exercise this power *prospectively* only; that is, petitioners argue that affirmance by this Court would preclude the Commission from reexamining revenues from gas that has already been delivered. We wish to make crystal clear the authority of the Commission in this case to reopen *any* part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.

At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.

In all other respects, the original opinion of this Court is the final disposition of this appeal.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 27492, *Et Al*

SOUTHERN LOUISIANA AREA RATE CASES
AUSTRAL OIL CO., ET AL.,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

Petition for Review of Orders of the Federal Power Commission (Texas Case)

Before THORNBERRY, COLEMAN and MORGAN,
Circuit Judges

JUDGMENT

This cause came to be heard on the petition of Austral Oil Co., Et Al, for review of orders of the Federal Power Commission in Docket No. AR 61-2 and RI 60-18, Et Al. and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Federal Power Commission in this cause be and the same are hereby affirmed.

It is further ordered that the stay ordered by this Court, subject to the usual extensions provided by Rule 41, FRAP, for petitions for rehearing and certiorari, should be dissolved unless further ordered, without prej-

udice, to the Commission's power to stay its own order or to take any other appropriate action affecting this case.

It is further ordered that petitioners pay to respondents, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate, Jul. 14, 1970 March 19, 1970

A true copy

Test:

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit

By /s/ [Illegible]
Deputy Jul. 14, 1970
New Orleans, Louisiana

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FILED
OCT 14 1970
E. ROBERT SEAVER, CLERK

Nos. 680, ET AL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

CONTINENTAL OIL COMPANY, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

RESPONSE OF E. COCKRELL, JR. TO PETITIONS IN NOS. 680, 681, 682, 683 AND 685

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FIDELITY PRINTING COMPANY, INC., HOUSTON

Nos. 680, et al.

In The

Supreme Court of the United States

October Term, 1970

Continental Oil Company, et al.,
Petitioners,

v.

Federal Power Commission,
Respondent.

RESPONSE OF E. COCKRELL, JR. TO PETITIONS IN NOS. 680, 681, 682, 683 AND 685

E. Cockrell, Jr. (Cockrell), a respondent in Nos. 669, 691 and 692, and a petitioner in No. 684, hereby responds to the petitions in Nos. 680, 681, 682, 683 and 685, which such latter petitions also seek writs of certiorari to review the judgment and opinions entered by the United States Court of Appeals for the Fifth Circuit in this same case on March 19, 1970, and June 16, 1970. In response to these petitions, Cockrell would show as follows:

1. In Nos. 669, 691 and 692, Cockrell is filing a brief opposing such petitions.

2. In Nos. 680, 681, 682, 683 and 685, Cockrell does not oppose the granting of such petitions. In the event such

petitions are granted, Cockrell would be aligned with the petitioners and not with the respondent Federal Power Commission.

Respectfully submitted.

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October 14, 1970

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Nos. 680, ET AL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

CONTINENTAL OIL COMPANY, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

RESPONSE OF BRADCO PROPERTIES, INC., et al., TO PETITIONS IN NOS. 680, 681, 682, 684 AND 685

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U. S. OIL OF LOUISIANA, LTD.

October 14, 1970

FIDELITY PRINTING COMPANY, INC., HOUSTON

Nos. 680, et al.

In The

Supreme Court of the United States

October Term, 1970

Continental Oil Company, et al.,
Petitioners,

v.

Federal Power Commission,
Respondent.

RESPONSE OF BRADCO PROPERTIES, INC., et al., TO PETITIONS IN NOS. 680, 681, 682, 684 AND 685

Bradco Properties, Inc., Freeport Sulphur Company, John W. Mecom, Lake Washington Inc., U. S. Oil of Louisiana Inc. and U. S. Oil of Louisiana, Ltd. (Bradco, *et al.*), respondents in Nos. 669, 691 and 692, and petitioners in No. 683, hereby respond to the petitions in Nos. 680, 681, 682, 684 and 685, which such latter petitions also seek writs of certiorari to review the judgment and opinions entered by the United States Court of Appeals for the Fifth Circuit in this same case on March 19, 1970, and June 16, 1970. In response to these petitions, Bradco, *et al.*, would show as follows:

1. In Nos. 669, 691 and 692, Bradco, *et al.*, are filing a brief opposing such petitions.

2. In Nos. 680, 681, 682, 684 and 685, Bradco, *et al.*, do not oppose the granting of such petitions. In the event such

petitions are granted, Bradco, *et al.*, would be aligned with the petitioners and not with the respondent Federal Power Commission.

Respectfully submitted,

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October 14, 1970

SUPREME COURT, U. S.

FILED
OCT 14 1970
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 681, 682, 683,
684, 685, 691 and 692

MUNICIPAL DISTRIBUTOR GROUP, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents.*

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT, PIPELINE PURCHASER GROUP

(Southern Natural Gas Company, Tennessee Gas Pipeline Company, Texas Gas Transmission Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, United Fuel Gas Company, United Gas Pipe Line Company)

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October 14, 1970

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 681, 682, 683,
684, 685, 691 and 692

MUNICIPAL DISTRIBUTOR GROUP, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents.*

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT PIPELINE PURCHASER GROUP

Respondent Pipeline Purchaser Group[1] opposes the petitions for writ of certiorari in the above-captioned nine causes, all of which relate to the judgment of

[1] The Pipeline Purchaser Group sought judicial review below but is solely a respondent here. The group consists of eight interstate pipeline purchasers, Southern Natural Gas Company, Tennessee Gas Pipeline Company, Texas Gas Transmission Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, United Fuel Gas Company, and United Gas Pipe Line Company.

the United States Court of Appeals for the Fifth Circuit entered on March 19, 1970, because under present circumstances the petitions are premature.

OPINIONS BELOW

The opinion of the Court of Appeals dated March 19, 1970, and its opinion on petitions for rehearing dated June 16, 1970, are not yet reported but have been printed as appendices to Continental Oil Company's petition in No. 680, Appendix A, pages 1-70 and Appendix B, pages 1-3, respectively. The opinions and orders of the Federal Power Commission are reported at 40 FPC 530, and 41 FPC 301, respectively.

JURISDICTION

Petitioners have sought to invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

In light of the opinions and judgment below, and the active status of related proceedings being heard by the Federal Power Commission ("Commission") in Docket Nos. AR 69-1, *et al.*, the Pipeline Purchaser Group believes all petitions for writs of certiorari in this case to be premature. Therefore, in our view the question actually presented is:

> Whether it is premature for this Court to review at this time procedural and substantive matters raised by petitioners, since the court below preserved to the Commission the responsibility for determining, in the first instance, the manner in which the recently recognized shortage of natural gas should be treated in prescribing producer rates—an undertaking the Commission is vigorously pursuing in proceedings which have not yet been concluded.

STATEMENT OF THE CASE

Although the petitions adequately describe the general history of the case, they do not focus sharply upon the problem with which the court below, and even more directly the Commission, was confronted.

This proceeding, the second initiated by the Commission under its program to regulate the rates of independent producers of natural gas through area ratemaking, commenced in May, 1961. At that time, and throughout the evidentiary stages of this proceeding, natural gas supplies from the Southern Louisiana area were adequate to meet consumer requirements, although the margin of safety was progressively narrowing.

By the time the Commission issued its decision, Opinion No. 546, on September 25, 1968, the shortage had reached the point at which interstate pipeline purchasers were unable to purchase currently the supplies of gas needed to meet their growing market requirements. Accordingly, when Opinion No. 546 was issued, the Pipeline Purchaser Group filed with the Commission a motion requesting the opportunity to bring to its attention tangible facts as to the gas supply problem, certain in the knowledge that the situation would deteriorate sharply unless the Commission took remedial steps through modification of the recently issued rate order. (R. 398858). Other parties made similar requests.

Although the Commission did not then apprehend the extent to which the gas supply shortage had overtaken the industry, and so did not reopen the proceeding for evidence as to this critical problem, it sought to resolve the issue by initiating another area rate

proceeding for Southern Louisiana, on the same day it denied rehearing in the instant proceeding. The new area rate proceeding, Docket No. AR 69-1, has been moving forward on an accelerated basis throughout the period the instant matter has been under judicial review.

Also, the Commission did not make effective the rate levels provided in its order in the instant proceeding, nor require the payment of refunds based upon such rate levels. In part, this is the result of stay orders issued by the Commission and the court below, and in part it is attributable to the fact that the Commission has not deemed it timely to order such actions.

As the hearings in the new area rate proceeding were commencing, the Commission enlarged the subject matter, initially relating only to offshore regions of the Southern Louisiana area, so as to embrace the onshore regions as well. Thus, the Docket No. AR 69-1 proceeding applies to the entire Southern Louisiana area, and to all vintages of gas, as well as to the appropriate price level for future discoveries.

The Pipeline Purchaser Group, while actively participating in the Docket No. AR 69-1 proceedings, also petitioned for judicial review in the United States Court of Appeals for the Fifth Circuit, urging that the Commission be directed to relate its Southern Louisiana rate order to the eliciting of adequate gas supplies for consumer needs, in light of current conditions.

Without detailing the steps leading to the judgment of the Court of Appeals, it is sufficient for present purposes to note that the Commission ulti-

mately requested a remand, and the court below undertook to assure petitioners and other parties that the Commission would be free to take such action as it deemed necessary to counteract the gas supply shortage. The Commission is currently attempting to do so with active cooperation of almost all the parties, including those involved in this litigation.

As recognized by the court below, the members of the Pipeline Purchaser Group appear in the instant matter solely in their role of purchasers and transporters of Southern Louisiana gas, and their alignment results from the fact that "they are concerned that the price level will not elicit sufficient supply for their needs." (Continental Appendix A, page 2). This is true with respect to this Brief in Opposition as well.

We urge the Court to permit the Commission to proceed as rapidly as possible to resolve the entire pricing problem for the Southern Louisiana area so as to ameliorate what has become a critical gas shortage of nation-wide proportions. This objective can be attained most directly and expeditiously through denial of the petitions for writs of certiorari as prematurely brought.

ARGUMENT

I.

In Its Present Posture, Supreme Court Review of the Judgment Below Would Be Premature

The petitions for writs of certiorari variously seek to question (1) the ratemaking formulae applied by the Commission, some contending that the resultant rates were too low (Nos. 680, 681, 683, 684, 685), and another petitioner contending that they were too high (No. 692); or (2) the procedure employed by the court

below for the purpose of enabling the Commission to implement its rate order if it saw fit while preserving the Commission's authority to modify the order if needed (Nos. 669, 691). Petitioner in No. 692 seeks further review as to both aspects. Finally, the major producer group, Texaco, *et al.*, has conditionally cross-petitioned in No. 681, recognizing prematurity but seeking the right to raise substantive issues in the event certiorari should be granted as to other petitions.

In our view, because of the particular circumstances involved, this case in its present posture presents no issue which is ripe for review. Until the Commission takes further action, which would of necessity be subject to appellate review, no party can be finally affected by the judgment below. And, until the Commission acts, no party can foretell which issues, if any, will ultimately be relevant.

Thus, although it is understandable that parties wish to protect their future positions, or even to obtain judicial sanction for those positions, neither of these objectives calls for affirmative action by the Court at this time.

What is required, we submit, is that the Commission be permitted to take such action as *it* finds to be appropriate in meeting the natural gas shortage in this all-important producing region, and to do so as soon as physically possible. This is so clearly required—and so patently an administrative function—that judicial intervention at this point is neither necessary nor appropriate. It will be time enough to review the court's procedural determination as well as the Commission's substantive ratemaking formulae when an administrative order has been entered dealing comprehensively with all these matters.

As noted above, the Commission instituted a new area rate proceeding in Docket No. AR 69-1 on March 20, 1969, the same day that it denied rehearing in the instant cause. Although initially limited to more recent vintages of gas from the offshore region of Southern Louisiana, the scope of the proceeding was enlarged on December 15, 1969, to embrace *all* vintages of gas from *all* regions of Southern Louisiana.

That proceeding, which none of the petitioners has sought to abort, is presently in a very advanced evidentiary hearing stage and settlement negotiations are progressing concurrently. Since one of the principal objectives of the proceeding is to come to grips with the economic aspects of the current gas shortage, there is every reason to allow that proceeding to be concluded, and no substantial reason to destroy it through piecemeal review of various portions of its subject matter.

The petitions in Nos. 669, 691 and 692 set forth various allegations regarding the impact of the judgment below as to potential refunds, but the facts are that the Commission has never entered an order requiring the payment of refunds in this proceeding. Nor does the court's action in any way preclude ultimate refunds. Contrary to the views expressed in those petitions, the principal issue below related to the rate levels which should have been prescribed—but both the Commission and the Court of Appeals have been at pains to maintain maximum flexibility for the ultimate determination of those rate levels by the Commission.

Since there is no reason to believe that the Commission will shirk its responsibility, and on the con-

trary, there is every indication that it is seeking to arrive at a fair and efficacious solution to a very complex problem, it clearly should not now be hampered or foreclosed.

Finally, with regard to the procedural matters, it is not at all clear that the court's reference to the Commission's freedom to make "retrospective as well as prospective adjustments in this case" would sanction "reparations" or "retroactive ratemaking" as some petitioners suggest. In the first place, as explained above, the Commission's original rate order was never implemented, so this is not an instance of rates having been made effective and later changed, *nunc pro tunc*. Moreover, since the Commission has not taken definitive action in this regard, there is no basis for contending that it has acted unlawfully.

If, in fact, the consequence of the judgment below, or the Commission's action in pending proceedings, were to result in "reparations" or "retroactive ratemaking", the Pipeline Purchaser Group would urge that certiorari be granted and the decision of the court below summarily reversed with directions to remand to the Commission for full reconsideration in light of the critical gas shortage. But, in our opinion, nothing of this nature has occurred.

Thus, both as to the substantive aspects and the procedural questions, the petitions for writs of certiorari present no issue which must, or should be, resolved at this time. The entire subject matter should remain, or be placed, in the hands of the Commission for a definitive determination at the earliest possible time.

CONCLUSION

Wherefore, for the foregoing reasons, the Pipeline Purchaser Group requests that all petitioners for writs of certiorari in these proceedings be denied.

Respectfully submitted,

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October 14, 1970

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ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 680, 681, 682,
683, 684, 685

CONTINENTAL OIL COMPANY, et al.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

(Continued on inside cover)

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT, MUNICIPAL DISTRIBUTOR GROUP

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TEXACO, INC., et al.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

THE CALIFORNIA COMPANY, A DIVISION OF CHEVRON OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

BRADCO PROPERTIES, INC., et al.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

E. COCKRELL, JR.,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

THE SUPERIOR OIL COMPANY,

Cross-Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 680, 681, 682,
683, 684, 685

CONTINENTAL OIL COMPANY, et al.,[1]

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT, MUNICIPAL DISTRIBUTOR GROUP[2]

[1] The Federal Power Commission was the only named respondent in the petitions; however, under this Court's rules, the petitioners must name all other parties to the proceeding below as respondents. (Rule 21, par. 4). The Municipal Distributor Group (MDG) was a party to the proceeding before the Commission and the Court of Appeals for the Fifth Circuit and was served with a copy of the petitions. The MDG, therefore, is a respondent, though not named in the petitions. MDG has also filed a petition for writ of certiorari (No. 669) limited solely to the question of whether the Commission may retroactively revise the rates affirmed by the court below.

[2] The Municipal Distributor Group comprises Memphis Light, Gas and Water Division operating municipal gas, electric and water systems in Memphis, Tennessee, and surrounding Shelby County, Tennessee, nine other Tennessee public systems, and American Public Gas Association, having a membership of 201 public systems operating in 28 states.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit and its Opinion on petitions for rehearing are not yet reported. They are printed respectively in Appendices A (pp. 1-70) and B (pp. 1-37) to the petition of Continental Oil Company and Mobil Oil Corporation in No. 680. The opinions and orders of the Federal Power Commission are reported at 40 FPC 530 and 41 FPC 301, and are printed as Appendices D (pp. 1-256) and E (pp. 1-112) to Continental Oil Company's petition.

JURISDICTION

The judgment of the Court of Appeals, printed as Appendix C to the petition of Continental Oil Company and Mobil Oil Corporation was entered on March 19, 1970. The Court of Appeals denied the petitions for rehearing by an opinion issued June 16, 1970 (App. B, pp. 1-3). The mandate was issued July 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Court of Appeals was correct in affirming the Federal Power Commission's opinions and orders.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, are set out in Appendix F to the petition of Continental Oil Company and Mobil Oil Corporation.

STATEMENT

PROCEEDINGS BEFORE THE COMMISSION

In May 1961, the Federal Power Commission ("Commission") initiated an investigation to determine and fix the just and reasonable ceiling rates for all sales by independent producers of natural gas in interstate commerce from Southern Louisiana, including the area offshore Louisiana in the Gulf of Mexico[3] (App. D, p. 6; 40 FPC 542). The Commission has described this area, particularly the offshore area, as constituting at the present time and for the foreseeable future a principal area of development of natural gas in the United States (App. D, pp. 6, 10-12; 40 FPC 542, 544-46).

The Commission initiated the investigation under Section 5(a) of the Natural Gas Act (Act)[4] and named as respondents 252 natural gas producers. The Commission also consolidated with the proceedings 199 Section 4(e)[5] proceedings involving 70 of the 252 producers (App. D, p. 6; 40 FPC 542). Numerous distributors of natural gas, private and public, interstate natural gas pipeline companies, state regulatory commissions, other interested parties, and the Commission's Staff participated in the proceedings.

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[3]The Commission has defined this area to include all parts of the State of Louisiana south of the thirty-first parallel, including all areas, both State and Federal, in the Gulf of Mexico off the shore of Louisiana. (App D, p. 6; 40 FPC 542).

[4]Section 5(a) clothes the Commission with the authority to initiate rate investigations on its own motion and, after hearing, to fix just and reasonable rates which are to be prospectively effective, i.e., from and after the date of issuance of the Commission's order fixing the just and reasonable rates (App. F, pp. 3-4).

[5]Section 4(e) proceedings resulted from the unilateral filing of notices of rate changes by producers under Section 4(d) of the Act. When filed they are subject to suspension for a five-month period, and if the rate investigation thereby initiated is not concluded at the end of the suspension period, the increased rates may be made effective subject to refund. (App. F, pp. 2-3).

Prehearing conferences and other meetings were held in an effort to bring the massive proceedings within manageable proportions. After these conferences and meetings had taken place, the cases-in-chief were prepared and served in advance of hearing and were placed in evidence on December 10, 1963. Rebuttal evidence was placed in evidence on March 24, 1964. Cross-examination commenced on April 23, 1964.

The hearings, with recesses, continued until the record was closed on November 5, 1965. The hearings produced a transcript of more than 34,000 pages, about 300 exhibits (most of them voluminous), and many items by reference (for the most part also voluminous).

The Presiding Examiner's decision was issued December 30, 1966 (III J.A. (1) 62d-447d, 40 FPC 703-902). With some exceptions the Examiner adhered to the Commission's *Permian* opinion (*Area Rate Proceeding*, Docket No. AR61-1, Opinion No. 468, 34 FPC 159, affirmed *Permian Basin Area Rate Cases*, 390 U.S. 747. He recommended maximum just and reasonable rates, depending on vintage and whether offshore or onshore production, of 16.75¢ to 19.5¢ per Mcf. After hearing oral argument *en banc*, on May 15 and 16, 1967, the Commission on September 25, 1968 issued its Opinion No. 546 and accompanying order (App. D, pp. 1-258, 40 FPC 530-702).[6] After consideration of applications for rehearing and motions to reopen, the Commission on March 20, 1969 issued its supplemental Opinion No. 546-A and accompanying order (App. E, pp. 1-112; 41 FPC 301). By the supplemental opinion and order, the Commission modified the original opinion and order in

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[6]The decision was issued after this Court on May 1, 1968 had sustained in their entirety the rate orders issued by the Commission in its first effort to fix producer rates on an area, rather than an individual company, basis. The first proceeding involved the Permian Basin. *Area Rate Proceeding*, Docket No. AR61-1, 24 FPC 1121 (1960), affirmed, *Permian Basin Area Rate Cases*, 390 U.S. 747 (May 1, 1968).

part, denied the motions for stay filed by many producers, and in all other respects denied the applications for rehearing.

THE COMMISSION'S OPINIONS NO. 546 AND 546-A AND ACCOMPANYING ORDERS.

The Commission established three vintages of natural gas and established the following as the just and reasonable ceiling rate for each vintage (App. D, p. 9; 40 FPC 544):[7]

Vintage	Rate	
	On Shore	Off Shore
	(cents per Mcf)	
All casinghead or oil well[8] gas (gas produced in association with oil) and pre-1961 gas-well gas (including residue gas derived from it) [old or flowing gas-well gas]	18-1/2	17
Gas-well gas sold under contracts dated January 1, 1961 through September 30, 1968 [new gas-well gas]	19-1/2	18
Gas-well gas sold under contracts dated October 1, 1968 or later [new gas-well gas]	20	18-1/2

[7]The Commission fixed January 1, 1961 as the date of division between "new gas-well gas and old gas-well gas". The latter type is also called "flowing gas" by the Commission (App. D, pp. 27-8; 40 FPC 555).

[8]The Commission found that casinghead gas is discovered largely as a product of the search for oil and therefore exploration for it could not be encouraged by awarding such gas the higher second and third vintage rates. The Commission, for this reason, fixed the rates for casinghead gas irrespective of vintage at the first vintage rates (App. D, pp. 85-6; 40 FPC 590-91).

The difference between on-shore and off-shore prices of 1-1/2 cents per Mcf represented the Commission's allowance in on-shore gas prices for Louisiana severance tax (App. D, p. 9; 40 FPC 544).

All of the prices were subject to upward and downward adjustment for heating value (Btu content) and the third vintage rates were also subject to reductions in the event of deviation from specified quality standards.

The rates for second vintage gas-well gas and the even higher rates for third vintage gas were awarded to elicit supply and to encourage continuation of necessary exploration and development.

With respect to rates collected by producers under Section 4(e) of the Act, the Commission rules that refunds would be required by further order of the Commission of the difference between the just and reasonable rate prescribed in Opinion No. 546 and the rate collected subject to refund (App. D, p. 143; 40 FPC 626). With respect to all other rates, the Commission ordered that the collection of rates in excess of the applicable area rate established in Opinion No. 546 from and after September 25, 1968, the effective date of the opinion, shall be subject to refund, plus interest at 7 percent.

The Commission ordered that these ceiling prices would be subject to change only in accordance with the procedure prescribed in Opinion No. 546. Under the procedure there prescribed, any seller seeking to charge rates in excess of the ceiling prices or requesting a change thereof must file a petition for waiver of the Commission-prescribed price and must justify fully the relief sought (App. D, p. 182; 40 FPC 650). Unless and until the Commission grants the petition, the seller may not file rate increases in excess of the applicable area rate prescribed in Opinion No. 546 (App. D, p. 182; 40 FPC 650). These rate-change provisions have been commonly described as prescribing an indefinite moratorium on rate changes.

The Commission's opinion departed from *Permian*, affirmed by this Court in full four months earlier, in a major respect. In *Permian*, the rates prescribed by the Commission were based directly on the costs, including a fair rate of return, determined by the Commission. In the present case, however, the Commission added a series of bonuses or cushions to each category of costs with the result that the rates prescribed were above the cost determinations, including rate of return, of up to 2¢ per Mcf. Consequently, although the prescribed rates were nominally based on a 12 percent overall rate of return on rate base, yielding approximately 13.3 percent return on common stock equity (App. D, pp. 67-8, 104; 40 FPC 579, 601), as the Commission conceded in the court below (Br. for FPC, p. 27, note 12) and the court below found (App. A, p. 40, note), the increments over cost increased the rate of return to more than 14 percent for Louisiana taxed gas (onshore) and to more than 16 percent for untaxed offshore gas.

After consideration of applications for rehearing the Commission on March 20, 1969 issued its Opinion No. 546-A and accompanying order modifying in part and confirming in part Opinion No. 546 and order.

The Commission re-affirmed that the rates established in Opinion No. 546 were just and reasonable. The Commission, however, while re-affirming that 18.5 cents per Mcf was the just and reasonable rate for offshore third vintage gas, exempted such gas from the rate change procedure prescribed by the Commission and authorized producers of such gas to file for contractually authorized increases up to 20 cents per Mcf, subject to suspension and possible refund (App. E, pp. 3-6; 41 FPC 306-07). The Commission also limited the application of the rate change procedures for third vintage on-shore gas sales to a five year period ending January 1, 1974 (App. E, pp. 7-8; 41 FPC 308-09).

Concurrent with the denial of all petitions for rehearing, the Commission initiated a second area rate proceeding at Docket No. AR69-1, limited to certain specified Southern

Louisiana offshore production areas, for the purpose of investigating the allegations of a gas shortage and cause therefor, if one in fact did exist, and to review the rates prescribed for such areas, and, if necessary, to prescribe new rates (App. E, pp. 4-5, 41 FPC 306; 41 FPC 378).[9] Referring to the new rate investigation, at that time limited to offshore production areas in the Federal domain, the Commission said (App. E, pp. 4-5):

> Many of the petitions for rehearing filed by the producers herein, and the motion for further argument filed by the Pipeline Group on November 22, 1968, devote primary attention to the basic question of the adequacy of present gas supplies to meet the increasing demands for natural gas and the adequacy of the rates established in Opinion 546 to elicit the future exploration, development and dedication necessary to meet this demand. No probative showing, based on the record before us, has been made in any such pleadings indicating that the prices we have established will be inadequate to bring forth the optimum degree of effort by the industry. However, the pleadings do lead us to the conclusion that the vital importance of future additional gas supply from the offshore areas in Southern Louisiana warrants the immediate commencement of the further proceeding we had contemplated in our original Opinion herein looking towards a possible revision of the area price ceilings for such gas.

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[9]Subsequently, by order issued December 15, 1969, the Commission enlarged Docket No. AR69-1 to include all offshore and onshore Southern Louisiana production areas with the result that the new proceeding became a second round area rate proceeding for Southern Louisiana reaching all rates prescribed in the present case. The new area rate proceeding is now in progress before a Presiding Examiner, any new rates prescribed would be effective from and after the issuance of a final rate order, consistent with the Commission's authority to fix rates prospectively only. *Sections 4(e) and 5(a); Hope Natural Gas v. FPC* (CA 4, 1952), 196 F.2d 803.

Petitions for review were filed in several courts of appeals within minutes of each other after public issuance by the Commission of its Opinion No. 546-A and order. The filing of a petition in the court below being first in time, review jurisdiction vested in that court. Petitions for review filed by producers and pipeline companies challenged the prescribed rates as too low and petitions for review filed by consumer representatives challenged them as too high.

By order of May 13, 1969, the court below granted a stay until hearing on the merits in June 1969, with this stay to expire no later than July 1, 1969. Thereafter, upon numerous producer requests for a later hearing, a conference was convened by the court below to consider these requests. As a consequence, the oral argument was postponed until October 6, 1969 and the Commission, at the court's request, stayed the ordered rate reductions (but no other aspects of its order) until October 13, 1969. The oral argument was held on October 6, 1969, before a panel of the court below which subsequently, by order issued October 17, 1969, vacated the submission of the cause to that panel and reassigned the case for argument and determination before an entirely new panel of judges of the same court. The stay of the Commission's orders was continued. The new panel heard oral argument on December 17, 1969.

Thereafter, on March 19, 1970, the Court below filed its opinion and judgment sustaining in full the Commission's opinions and orders (App. A, p. 69). While expressing less than "full satisfaction" with the Commission's "performance", both with respect to producer and consumer positions, the Court below rejected producer and consumer objections to the orders and found them to be sustained by substantial evidence and free from legal error, recognizing in this connection "that the process of producer regulation is a difficult one that the Commission must have latitude to adapt to changing conditions" (App. A, pp. 2-3, 10, 20-21, 24, 29-30, 40). The court below went on to say that its mandate "should not, however, be interpreted to inter-

fere with Commission action that would change the rates we have approved here." (App. A, p. 69).

Petitions for rehearing were filed by the producer and pipeline petitioners. These petitioners, *inter alia*, agreed that the Commission, notwithstanding affirmance, may modify its orders for the future and the rates to be charged prospectively, but expressed grave doubts that the Commission could revise the rates prescribed in Opinion No. 546, as modified by Opinion No. 546-A, retroactively. Producer and pipeline petitions for rehearing, therefore, urged the court below, as a means of preserving the Commission's authority to revise the rates retroactively, to grant rehearing, and upon such rehearing, to either instruct "the Commission to make further findings on issues deemed deficient by the Court" or to "grant the Motion for Leave to Adduce Additional Evidence heretofore filed" (e.g., Petition for Rehearing of Humble Oil & Refining Company and Humble Gas Transmission Company, pp. 3, 9; Amerada Hess, et al., pp. 2-3, 9-10).

On May 11, 1970, the court below directed the Commission and other parties to the review proceedings to respond to two questions:

> (1) Whether the Federal Power Commission has authority to stay, modify, or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.
>
> (2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify, or rescind the order if the circumstances seem to make these actions advisable.

Responses were filed by MDG, the New York Public Service Commission, Associated Gas Distributors (a group of private distributors of natural gas), and the Commission.

All responses agreed that following affirmance of the Commission's orders, the Commission would not have the power under the Natural Gas Act to revise retroactively the prescribed rates. The Commission also responded that the extent of the Court's equitable powers under Section 19(b) of the Natural Gas Act "apparently has not been decided" and that the extent to which the court's equitable powers "would transcend these statutory powers would be determined by" the court below. Over the vigorous dissent of Commissioner O'Connor, joined by Chairman Nassikas, the Commission by a 3 to 2 vote, concluded its response with an about-face request for remand, unaccompanied by any explanation.

The Municipal Distributor Group, the Associated Gas Distributors and the Public Service Commission of New York opposed the request for remand.

On June 16, 1970, the court below entered an order denying the petitions for rehearing.

The court below stated (App. B, pp. 1-3):

> . . . We wish to make crystal clear the authority of the Commission in this case to reopen any part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.
>
> At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has

> ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.
>
> In all other respects, the original opinion of this Court is the final disposition of this appeal.[10]

Subsequently, the court below denied producer applications for stay of the mandate, but on July 2, 1970, acting on its own motion, and without notice, the Commission entered an order continuing the stay of Opinions No. 546 and 546-A and accompanying orders.[11]

On July 2, 1970, certain producers, based on the decision of June 16, 1970 of the court below, filed a motion for continuation of the stay and for reopening of the proceedings and consolidation thereof with the new, second round of Southern Louisiana area rate proceedings at Docket No. AR69-1 and for retroactive reconsideration of the rate levels and refund requirements of the orders affirmed by the court below. Pending also before the Commission are petitions by two producers for exemption from the refund requirements of the orders.

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[10] MDG in No. 669, the New York Public Service Commission in No. 692, and the Associated Gas Distributors in No. 691, have filed petitions for writs of certiorari directed to the ruling of the court below that the Commission may revise rates retroactively.

[11] MDG's application for rehearing of the Commission's July 2 order continuing the stay on the ground that the order is beyond the Commission's power, was denied by order issued September 30, 1970.

ARGUMENT

The decision of the court below in the respects challenged by Continental Oil Company and Mobil Oil Corporation (Petitioners),[12] does not conflict with any decision of this Court or with decisions of another circuit court of appeals. The court below properly exercised its functions as a reviewing court and properly affirmed the Commission's opinions and orders on the ground that they are supported by substantial evidence, followed legal standards, and are free from legal error. No issues raised by Petitioners warrant or necessitate review of this Court.

1. In the *Permian Basin Area Rate Cases*, 390 U.S. 747, this Court emphasized that reviewing court's "authority is essentially narrow and circumscribed." (390 U.S. at 766). For the Commission's findings, if supported by substantial evidence, are unqualifiedly conclusive upon the court (390 U.S. at 767); Congress "has entrusted regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts." (390 U.S. at 767); the orders of the Commission are presumptively valid and those who would overturn them have "the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." (390 U.S. at 767); and each detail of the Commission's decision need not be examined if the total effect of the order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end (390 U.S. at 767).

In fulfilling its review function, this Court said, a reviewing court has essentially three responsibilities: first, to

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[12] The petitions filed in Nos. 681, 682, 683, 684 and 685 raise substantially the same issues raised by Petitioners in No. 680. Accordingly, while referring only to Petitioners' position in No. 680 in this brief in opposition, it is also intended to be, and is filed, as MDG's brief in opposition to the petitions in Nos. 681, 682, 683, 684 and 685.

determine whether the Commission's orders, viewed in light of the relevant facts and its broad regulatory duties, abused or exceeded its authority; second, to examine the manner in which the Commission employed the methods of regulation it has selected and to decide whether each of the orders' essential elements is supported by substantial evidence; and third, to determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. (390 U.S. at 791-2).

The court below was fully aware of its authority and its responsibilities as a reviewing court as delineated by this Court (App. A, pp. 9, 10) and the court below correctly performed its function. On the question of the specification of the circumstances under which producers could secure relief from the rates prescribed by the Commission, the court below found that the Commission had responded to this Court's suggestion in *Permian* for a more precise specification of changed circumstances that would be ground for relief, and had given examples which "probably constitute as specific an exposition of circumstances for relief as can be expected at this stage in area regulation" (App. A, p. 15). With respect to consumer arguments that the Commission's cost determinations were excessive and that allocation methods adopted by the Commission assigned too much to natural gas and too little to oil, the court below found that the Commission acted on the basis of substantial evidence (App. A, pp. 18-21 and notes 29 to 34, inclusive). With respect to rate of return, the court below reviewed consumer arguments that the 12 percent rate of return was too high and producer arguments that it was too low and rejected the arguments of each on the ground that the Commission's findings on rate of return were supported by substantial evidence and "followed proper legal standards," noting that the "noncost factors" increased the allowed 12 percent rate of return to 14 to 16 percent

(App. A, pp. 23, 24, 40, and note on p. 40). Concerning producer attacks on Commission cost determinations, the court below found that the producers' attacks on the use of cost and on the cost determinations were also made in *Permian* and were there rejected by this Court (App. A, pp. 40-42); and that the Commission's cost findings here were supported by substantial evidence (App. A, 41-42). Respecting the producers' arguments that the record was stale and unrepresentative, despite the fact that there was no issue as to test year before the Commission, the court below rejected the arguments, correctly relying on *ICC v. Jersey City*, 322 U.S. 503, 514-5, and correctly finding that the Commission considered "some data covering years as recent as 1966" and in making choices between older and more recent data on the ground of greater reliability or representativeness "did not fail to consider the most recent data in the record, and it adjusted its findings to allow for rising or falling cost trends" (App. A, p. 44). "Most importantly", the court below found, "it made a finding that costs as a whole during this decade had been remarkably stable (or were even declining slightly) and were likely to remain so, and this finding is based upon substantial evidence." (App. A, p. 44).

In view of the court's findings that the Commission's rulings followed legal standards and were based on substantial evidence, the court below stayed within its proper sphere when it entered its judgment of affirmance. Indeed, contrary to Petitioners' contention (Pet., p. 17) this was the only logical, lawful and required action; not reversal and remand. The court below understood and properly fulfilled its judicial role as a reviewing court.

It is, of course, true that the court below was not entirely satisfied with the extent of some of the Commission's findings and explanations, as they affected consumer and producer arguments, but the court below did not find that the deficiencies amounted to reversible error. Having found that proper legal standards were employed and that substantial

evidence supported the findings on every important aspect of the case that bears on recovery of costs, including an extremely generous 14 to 16 percent rate of return, the court below correctly refused to regard the Commission's opinions and orders when viewed in their entirety as reversible.

Federal Power Commission v. United Gas Pipe Line Company, 393 U.S. 71 (1968) and *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 353 U.S. 944 (1957), cited by Petitioners (Pet. 17), are not in point. In the *United* case, *supra*, the Fifth Circuit undertook to decide how a tax allocation formula should be applied although the Commission had never considered the question. This Court summarily reversed the Fifth Circuit on the ground that it should have remanded the question for consideration by the Commission in the first instance (393 U.S. at 73). Nothing of that nature is involved in this case. In *Sunray Mid-Continent*, the Tenth Circuit reversed the Commission (239 F.2d 97) because it had erred in its interpretation of its authority under Section 7 of the Natural Gas Act. This Court held that the power of the reviewing court was exhausted when it so ruled and that it should have remanded the case to the Commission for consideration on the merits (353 U.S. at 945). This fact situation is not present in this case. Here, the relevant questions presented by the record evidence had been considered and the court ruled that all rulings on such questions were lawful and were supported by substantial evidence.

2. Petitioners' continued insistence that the methods of rate regulation employed by the Commission for producers are inapplicable to producers and that the Commission's cost determinations in this case are faulty (Pet. 15, 23, 24-25) are without merit and provide no basis for a grant of their petition. The same arguments respecting methodology, particularly reliance on cost, were rejected by this Court in *Permian* where they were specifically found to have a "reasoned foundation" and to be within the area of the Com-

mission's expert judgment (390 U.S. at 824), and were rejected by the court below for the same reasons (App. A, pp. 40-42). As for the cost determinations in this case, they were found to be supported by substantial evidence and in accord with legal standards. Petitioners show nothing in their petition requiring a contrary conclusion. Petitioners rely on bold assertion, without record support and citation.

3. The Alpha and Omega of the Petitioners' argument for a writ of certiorari is the claim that there is a present shortage of natural gas which "is directly involved in this case because rates prescribed apply to an area that now provides up to one-third of the total national supply and serves more than one-half the consuming population of the United States." (Pet. 15, 24, 25).[13]

Petitioners state that "the only valid question remaining is, in essence, how to remedy" the supply "situation" (Pet. p. 16), and suggest that reversal is the only remedy (Pet. p. 16). Inherent in the argument is the unwarranted assumption that "the Commission's ill-founded and unsound regulatory concepts have hastened, if not caused, the present critical gas supply shortages." (Pet. p. 24).

Any number of reasons may account for the "shortage", however, which have no relationship to the present order

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[13] Assuming, *arguendo*, that there is a shortage of natural gas, it is important that the Court not be misled. The "shortage" does not affect existing commitments to consumers. There is no "shortage" to meet such existing commitments: The "shortage" refers to new increments of gas to meet an unexpected and explosive recent demand for natural gas, primarily industrial, as a result of air pollution and other environmental considerations. The demand for natural gas has been aggravated by the shortage of other fuels such as low sulphur oil and coal that are suitable for such purposes. The "shortage" assumes all demands should be served by natural gas disregarding the question of the economically wasteful use of natural gas and efficient allocation of the Nation's energy resources, including natural gas, in the Nation's best interests.

in particular and the Commission's regulatory policies in general.[14]

The "shortage" may be the consequence of the acknowledged explosive increase in demand for gas that the industry did not anticipate or prepare for. The "shortage", such as it is, may be the consequence of tax policies that may have reduced internally generated funds available for exploration and development rather than any Commission pricing of natural gas. Depressed sales of oil, upon which the industry principally relies for internally generated funds for exploration and development, may have reduced exploratory effort. Enormous commitments made by the oil companies in foreign areas and Alaska may have drained off funds that would normally have been available for exploration and development of continental, including continental shelf, gas resources. Failure of the Federal government to offer oil and gas leases in areas in the federal domain may have affected reserve additions. The "shortage" may be a result of a combination of some or all of these forces or of others not mentioned. Or the "shortage" may be contrived to force higher prices for natural gas. Testifying before the Senate Judiciary Sub-Committee on Antitrust and Monopoly, Honorable George P. Shultz on March 3, 1970, said:

> The [petroleum] industry is capable of behaving irrationally for short periods, and even of contriving an apparent disaster by ceasing exploration [and] dramatically revising its reserve additions downward . . . [Such industry action could] produce an appearance of crisis calling for immediate 'corrective' action, e.g., . . . higher prices. . . . The industry associations could help to produce such an impression . . . And we must not forget that the

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[14] A lag between exploratory efforts and production of at least several years rules out any relationship between the Commission's orders in this case and the "shortage" which is alleged to have developed on the heels of the Commission's orders.

> 'facts' for decision will be produced largely by these same firms and associations.
>
> The industry is not monopolistic enough to sustain a false reaction over an extended period; in the long run the normal commercial motives will reassert themselves and objective facts would win out. But we have no assured means of preventing overreaction or downright manipulation in the short run, nor is it clear how the administration would distinguish between a fake disaster and a real one.

Whatever the cause or causes of the "shortage" may be, it is a circumstance that is not relevant to review of the orders in this case. The court below noted (App. A, p. 52) that "circumstances" had developed subsequent to the close of the record and issuance of the Commission's decisions that "indicate a possibility, indeed perhaps a certainty, that the supply of gas is dangerously low." The "circumstances" included speeches made by members of the Commission (App. A, p. 53), clearly extra-record and non-evidentiary and an FPC Staff *Report on National Gas Supply and Demand*, (App. A, p. 54) issued six months after the Commission's order on rehearing. With respect to this latter document, which is also extra-record and non-evidentiary, the lower court stated (App. A, p. 58):

> . . . We do not know whether the information that has reached us is correct or not. Staff states that 'For purposes of this report we have accepted at face value all industry furnished data. Our conclusions must therefore be weighed against the assumed accuracy of our data base.' It also states that it is setting forth only one of several possible forecasts, albeit it is the one it thinks most probable.

The whole question of "shortage" was then placed in proper perspective by the court (App. A, p. 58):

> . . . our best course is to keep within the proper sphere of a reviewing court. The point is that the probability of shortage *based on new evidence* is not before us for review; all that is before us is the legal

adequacy, and not the wisdom, of the Commission's orders. (italics supplied)

The true nature and cause or causes of the "shortage" are not known and are yet to be established. The Commission has instituted a new proceeding at Docket No. AR69-1 to do just that and to determine whether rate revisions are in order. Docket No. AR69-1 is the place for the remedy *if* the "shortage" is price-related. *ICC v. Jersey City*, 322 U.S. 503, 515; *National Labor Relations Board v. Condenser Corp.*, 128 F.2d 67, 81 (CA 3).[15] The claim of a gas shortage is simply not relevant to the disposition of the Commission's rate orders.

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[15] ". . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening . . ." (322 U.S. at 515). "The legal situation has to be viewed as of the time of the Board's Decision; otherwise, there is the danger, often spoken of, of making a merry-go-around of the Act." (128 F.2d at 81).

CONCLUSION

The petitions for writs of certiorari in Nos. 680, 681, 682, 683, 684, and 685 should be denied.

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October 15, 1970.